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SUPREME COURT, U.S.

No. 98-123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROCKIE RATCLIFF, ET AL.,

Petitioners,

v.

CAPITAL CITIES/ABC, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was required to decide whether petitioners, as claimants to benefits from ERISA-covered employee benefit plans, were "employees" under the common law agency principles set forth in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1982), despite having determined that—regardless of their status as employees or independent contractors—petitioners were not entitled to the benefits because (1) they had entered into bilateral contracts that clearly and unequivocally provided that their compensation did not include participation in employee benefit plans and (2) the terms of the plans in question excluded petitioners from participation.

RULE 29.6 LISTING

Listed below, for each of the corporate respondents, are the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. For purposes of this statement, an "affiliate" is defined as any company in which any of the corporate respondents holds an interest of ten percent or greater of outstanding securities:

ABC, Inc. (formerly, Capital Cities/ABC, Inc.)

Parent Company: The Walt Disney Company

Non-Wholly Owned Subsidiaries and Affiliates: None

The Kansas City Star Company

Parent Company: Knight-Ridder, Inc.

Non-Wholly Owned Subsidiaries and Affiliates: None

Cypress Media, Inc. (formerly, Capital Cities Media, Inc.)

Parent Company: Knight-Ridder, Inc.

Non-Wholly Owned Subsidiaries and Affiliates: None

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Capital Cities/ABC, Inc., *et al.*, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 141 F.3d 1405 and is reprinted in the Appendix to the Petition (Pet. App.) at 1a-17a.

STATEMENT

Respondent The Kansas City Star Company ("The Star") publishes *The Kansas City Star*. Until March 1990, it also published *The Kansas City Times*. The Star was formerly a wholly-owned subsidiary of respondent Capital Cities/ABC, Inc. The remaining respondents are the four benefits plans at issue in

this case, the two Plan Committees responsible for administering the plans, and the individual members of those Committees.[1]

Petitioners claim entitlement to benefits from four employee benefit plans that respondents make available to certain employees of The Star. These Plans are: The Capital Cities/ABC, Inc. Savings & Investment Plan; The Capital Cities Publishing Pension Plan; The Kansas City Star Company Group Insurance Plan; and The Kansas City Star Spending Account Program. A single benefits committee serves as the plan administrator for the Savings Plan and the Pension Plan. A separate committee serves as the plan administrator for both the Insurance Plan and the Spending Account Program. Pet. App. 4a.

Petitioners are newspaper "carriers" who currently or formerly delivered *The Kansas City Star* and/or *The Kansas City Times* pursuant to individual Agency Agreements with The Star. From 1880 until 1977, the carriers bought papers from The Star at a wholesale rate and then resold them at a retail rate to customers. Pet. App. 4a. There is no dispute that prior to 1977 the carriers were independent contractors rather than employees of The Star. *Id.* Beginning in September 1977, shortly after Capital Cities acquired The Star, The Star modified its newspaper delivery system. Under the new arrangement, The Star sells the papers directly to subscribers, and the carriers are paid a fee for delivering the papers and collecting payments from subscribers. This new arrangement is set forth in one or more "Agency Agreements" between The Star and each carrier. Pet. App. 4a-5a.

The Agency Agreements make clear that the 1977 change in The Star's delivery system was not intended to change the nature of the carriers' status as independent contractors, and that, in any

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[1] In this brief, the four benefit plans are collectively referred to as the "Plans" and the two committees as the "Committees."

event, the carriers were not entitled to participate in the Plans. Among other things, the Agency Agreements provide that:

> - The Agent is and will continue to be a self-employed independent contractor and not an employee or servant of The Star.
>
> - It is expressly understood and agreed between the parties that The Agent will not be treated by The Star as an employee for federal, state, or local tax purposes; . . . and that The Agent is an independent contractor for purposes of the Internal Revenue Code and for all other purposes.
>
> - It is further expressly understood that, as an independent contractor, The Agent will not receive, and has no claim to, any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees.
>
> - *It is expressly understood that* [the specified delivery fees, plus various incentive fees] shall constitute the full extent of The Agent's compensation under this Agreement and that *The Agent has no claim to any benefits or other compensation currently paid by The Star to its employees* or hereafter declared by The Star for the benefit of its employees.

Pet. App. 5a (emphasis added).

Until September 1994, no carrier made any claim for employee benefits or contended that he, she or it (some of the carriers are incorporated) was anything other than an independent contractor. At that time, a group of roughly 30 carriers made a formal claim for benefits to the Plan Committees on behalf of themselves and all carriers similarly situated. The request was apparently prompted in part by a 1993 Internal Revenue Service

Technical Advice Memorandum that suggested that all but the very largest carriers were common law employees of The Star for federal tax purposes—a position that the Service has since repudiated. Pet. App. 5a & n. 2.

In November 1994 the Committees issued decisions denying the carriers' claims. The denials were based on three independent grounds: (1) by executing the Agency Agreements, each newspaper carrier had expressly agreed that he, she or it was not entitled to benefits; (2) the term "employee" as used in the Plans does not include those who perform services as carriers pursuant to an Agency Agreement; and (3) the carriers fall outside the common law definition of "employee," making them ineligible for benefits under tax-qualified ERISA plans.

Respondents then filed an action in U.S. District Court for the District of Kansas seeking a declaratory judgment upholding the decisions of the Committees. Petitioners followed with their own class action suit, which was consolidated with petitioners' action for declaratory relief.

The district court granted respondents' motion for summary judgment on both of the two independent grounds raised in the motion: First, the carriers' relationship with The Star is defined by the Agency Agreements, which expressly provide that the carriers are not entitled to the employee benefits offered by The Star to certain of its employees, and are not entitled to any compensation beyond the fees specified in the Agency Agreements. Second, the terms of each of the four Plans did not extend benefits to the carriers.

The court of appeals affirmed on both alternative grounds. Pet. App. 7a. Like the district court, the court of appeals rejected petitioners' argument that it was necessary to decide whether the carriers were common law employees of The Star under the common law test of agency adopted by this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318

(1992). The court of appeals held that it did not have to determine that question because, regardless of the carriers' status, they would not be entitled to the benefits claimed. Pet. App. 8a-9a. It explained that *Darden* "does not say that any person meeting the common law definition of employee is entitled to ERISA benefits." Pet. App. 9a. "Indeed," the court noted, "it is well established that employers may exclude categories of employees from their ERISA plans." *Id.*, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Having already determined that the carriers were excluded from The Star's ERISA plans both by reason of the bilateral Agency Agreements and under the terms of the Plans themselves, the court declined to consider whether petitioners were common law employees.

Petitioners then filed their petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the petition.

The sole Question Presented in the petition (p. i) is whether a worker's status as an employee or independent contractor "under ERISA" may be determined

> "exclusively by agreement between the worker and the employer such that a court may refuse to examine the remaining factors of the common-law test of agency articulated in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992)."

Neither the court of appeals nor the district court decided any such question in this proceeding. Neither court decided that petitioners were independent contractors rather than employees, let alone decided that question solely by reference to the Agency Agreements and without consideration of the other *Darden* factors. Rather, both lower courts held that, *no matter whether the carriers are common law employees*, they are not entitled to participate in the Plans.

As the court of appeals recognized—and petitioners do not contest—ERISA does not mandate that all persons who meet the common law definition of an employee be included in a company's benefit plans. *See* Pet. App. 9a. In enacting ERISA, Congress intended to allow employers to retain their pre-existing discretion to decide what benefits, if any, they provide to various groups of employees. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Employers commonly create and maintain employee benefit plans that exclude various categories of persons

who might meet the common law definition of an "employee."[2]

The court below concluded, on two independent grounds, that petitioners were not entitled to benefits: (1) the Agency Agreements make clear that the carriers are not entitled to Plan benefits, and (2) the terms of the Plans themselves exclude the carriers as participants. Having determined that the carriers were *not* included in The Star's benefit plans, the court had no reason to examine the common law test of agency articulated in *Darden*. Because the carriers were not entitled to benefits from The Star's Plans in any event, any opinion as to whether they were common law employees would have been purely advisory, and the court of appeals rightly declined to address the issue.

2. There is no conflict with *Darden*.

Because the court below did not have to, and for that reason did not, address the highly factual question of whether each of the 1600 or more members of the class represented by petitioners were common law employees of The Star, there is no conflict with this Court's decision in *Darden*.

In *Darden*, the claimant, an insurance agent, provided services pursuant to a contract that promised he would be covered by the company's pension plan, unless he quit to go to work for a competitor within a specified period in which event he would lose his pension benefit. After going to work for a

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[2] *See* 26 U.S.C. § 410(b)(1), (2) (expressly permitting a tax-qualified pension or savings plan to exclude employees as long as the plan does not discriminate in favor highly compensated employees); 26 U.S.C. § 401(a)(26) (requiring a tax-qualified defined benefit pension plan to benefit at least the lesser of 50 employees or 40 percent of all of the employer's employees); *cf.* 26 U.S.C. § 410(a)(4) and ERISA § 202(a)(4), 29 U.S.C. § 1052(a)(4) (indicating that a pension plan may exclude employees who meet ERISA's age and service requirements if the employees are not "otherwise entitled" to participate in the plan).

competitor, he sued, claiming that the non-competition clause was unenforceable because it was inconsistent with the ERISA prohibition against forfeiture of vested pension benefits. 503 U.S. at 320. The anti-forfeiture provision, 29 U.S.C. § 1053(a), protects only the rights of "employees" to vested pensions, and the Court held that "employee" for this purpose means a common law employee. Thus, Darden had to establish that he met the common law definition of "employee" in order to have standing to pursue a claim under ERISA.

The Tenth Circuit rightly concluded that the *Darden* decision has no bearing on cases in which the employer has not offered or promised any benefits to the worker, the worker has agreed that he or she will receive no benefits, and the terms of the plans exclude those workers from coverage. Pet. App. 9a. As the district court observed, the Carriers' reliance on *Darden* "confuse[s] the issue of standing with the issue of whether parties can contractually define entitlement to ERISA benefits." Pet. App. 33a. *Darden* says nothing about whether the parties may agree *ab initio* on a compensation package that does not include employee benefits.

3. There is no conflict among the circuits.

Petitioners posit a conflict among the circuits on the question whether "a contract between a worker and an employer may conclusively define the worker's status for ERISA purposes." Pet. 9. But the court of appeals did not hold that the Agency Agreements conclusively established that the carriers were independent contractors with no standing to sue under ERISA. Rather, the court held that, regardless of the carriers' status as employees or independent contractors, they were excluded from participation in the Plans. Far from being in conflict, the courts of appeals agree that an employer may lawfully design an

employee benefit plan that does not cover all of the employer's common law employees.[3]

Because ERISA creates no entitlement to benefits beyond the extent to which the employer has promised to provide benefits to the worker, there is no need to decide whether the worker *might* have been included in a benefit plan as an "employee" within the meaning of the statute, when, as here, the worker was clearly excluded from coverage under the plan. And because ERISA, unlike the minimum wage laws, for example, creates no statutory right to any level of benefit coverage, ERISA does not render unenforceable bilateral agreements under which the worker agrees that his compensation will not include coverage under the company's employee benefits.

Petitioners assert that the decision below "most notably" conflicts with the Ninth Circuit's decision in *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 899 (1998), and the Eleventh Circuit's

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[3] *See, e.g., Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996) (ERISA "does not prevent employers from denying participation in an ERISA plan if the employer does so on a basis other than age or length of service"); *Central States, Southeast & Southwest Areas Pension Fund v. Hartlage Truck Service, Inc.*, 991 F.2d 1357, 1362-63 (7th Cir. 1993) (ERISA does not prohibit a pension plan from excluding employees on the basis of their casual status); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986) (employment alone does not entitle an employee to become a plan participant); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (*en banc*), *cert. denied* 118 S.Ct. 899 (1998) (plan administrator must decide in the first instance whether persons who are admittedly common law employees are excluded from coverage by the terms of the plan). *See also Bronk v. Mountain States Tel. & Tel.*, 140 F.3d 1335 (10th Cir. 1998) (prohibition in ERISA § 202(a), 29 U.S.C. § 1052(a), against pension plan provisions requiring participants to have more than one year of service or to be over age 21 does not prevent employers from relying on other criteria to exclude employees who satisfy the age and service requirements).

decision in *Daugherty v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993), because these courts applied the *Darden* common law agency test to determine whether a worker was an employee or an independent contractor for purposes of ERISA. Pet. 9. At most these cases demonstrate that the terms of individual contracts between workers and those receiving their services and differences in the terms of particular employee benefit plans might result in different outcomes. These are *factual* differences and do not present a legal question appropriate for resolution by this Court.

In *Vizcaino*, in light of Microsoft's concession that the plaintiffs were common law employees, the Ninth Circuit concluded that the provisions in bilateral agreements characterizing the workers as independent contractors were not binding because they were based on a "simple mistake" by the parties. 120 F.3d at 1010, 1011. Even so, the *Vizcaino* majority declined to rule that the workers were entitled to participate in the Microsoft 401(k) savings plan ("SPP"), the only plan governed by ERISA that was involved in that appeal.[4]

The SPP provided that eligible persons were employees who were "on [Microsoft's] United States payroll," and the *en banc* majority concluded that it was up to the plan administrator to decide, in the first instance, whether the plaintiffs were barred from participating in the SPP by reason of this language and the fact that they were not listed on the company's payroll. *Id.* at 1013. Thus, in determining whether the plaintiffs were entitled to plan benefits, the Ninth Circuit held that it was not their status as common law employees but "the terms of the SPP which control." *Id.* There is no conflict between that opinion and the Tenth Circuit's decision that The Star's employee benefit plans excluded the carriers as participants.

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[4] A Microsoft stock purchase plan was also involved, but its interpretation was governed by the common law of the State of Washington, not ERISA.

Daugherty also does not conflict with the decision below, because that case is best understood as deciding a question of standing, which is not an issue presented in this case. *Daugherty*, like *Darden*, is a case in which the worker initiated a suit against the company or its benefit plan. In order to have standing to pursue a suit for benefits under ERISA, the plaintiff-worker first had to establish that she was an "employee" within the meaning of the statute. The court was thus obliged to apply the *Darden* common law agency factors simply to determine whether the plaintiff had standing to pursue her claim. The Eleventh Circuit in *Daugherty* did *not* hold that the *Darden* inquiry would determine whether the plaintiff was entitled to the benefits claimed. Quite clearly, the answer to the standing question does not answer the questions whether the company and the worker may have entered into a bilateral contract excluding the worker from benefits coverage or whether the plans themselves might define "employee" or participant more narrowly than "employee" is defined for common law purposes.

This case, in contrast to *Daugherty* and *Dykes v. Depuy, Inc.*, 140 F.3d 31 (1st Cir. 1998), also cited by petitioners, was brought as a declaratory judgment action by the Company. Because the district court determined that it had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, it did not have to decide whether petitioners would have standing as common law employees to pursue their own claim under ERISA. Pet. App. 26a. Unlike the cases initiated by workers, the court did not have to engage in a threshold *Darden* analysis, and it did not do so. The outcome in this case is not the result of a "split" among the circuits, but simply the practical consequence of different procedural postures of the cases.[5]

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[5] Petitioners also claim a conflict with *Trombetta v. Cragin Fed. Bank Ownership Plan*, 102 F.2d 1435 (7th Cir. 1996). Far from being in conflict, the Seventh Circuit's decision in that case is completely consistent with the Tenth Circuit's opinion below. In *Trombetta*, the court held that (continued...)

In sum, the court below found that, both by the express terms of the Agency Agreements and the express terms of the employee benefit plans, petitioners were not participants in the Plans, regardless of whether they were common law employees of The Star. The decision below does not raise the Question Presented in the petition, does not present any inconsistency with this Court's decision in *Darden*, and is fully reconcilable with the decisions of other circuits. There is no issue requiring resolution by this Court, and the petition for a writ of certiorari should be denied.

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[5](...continued)
"[i]t is not enough to determine that they are common law employees . . . because [the employer] need not extend this benefit plan to all employees." 102 F.3d at 1440.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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